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Workplace Relations, Employment & Safety

In August 2018, I published an update about the implications of the Full Federal Court decision in *WorkPac Pty Ltd v Skene*. It set the cat among the pigeons with an interpretation that had the potential to **affect all organisations with a casual work force**.[1]
The *Skene* decision deals with situations in which a **casual employee may argue that they should be characterised as a permanent employee**. Potentially, they can make a claim for paid leave and other entitlements. This creates a double-dip scenario.
Workpac was unsuccessful in getting the Federal Court to reconsider the *Skene* decision, but it has continued to test the law in an attempt to distinguish work arrangements with another employee, **Rossato**.

***Workpac Pty Ltd v Rossato* [2020] FCAFC 84 - 20 May 2020**
In *Skene's* case, Workpac showed a clear commitment to giving Skene **ongoing work**. This made it impossible for Workpac to argue that Skene was a casual.
Conversely, in the *Rossato* case, Workpac attempted to persuade the Federal Court to reconsider similar issues, because the **facts were different**. This enabled Workpac to mount a different legal argument.

Workpac argued that:

- It **did not make any firm advanced commitment** to *Rossato,* who was a casual employee
- Rossato's employment status should be determined by reference to the **time when the contract was made**, rather than by reference to how the contract was performed for the duration of the employment
- It was entitled to **offset** the portion of the hourly rate which was casual loading, against any **annual and personal leave and other NES entitlements** (or restitution for the amounts paid)

The *Rossato Decision* – what does it mean?
While each of the Judges delivered their own separate judgments, there was a general agreement amongst them about the outcome of the decision and its legal effect.
The Court concluded that:

- Because Rossato was **not a casual employee**, he was entitled to the benefits of the applicable Enterprise Agreement and the NES
- Workpac **could not offset** any amount paid to Rossato including the casual load
- Workpac **could not seek restitution** for amounts paid

Notwithstanding these general agreements, there appears to be differing opinions about when an employee is a casual and when they are permanent.

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Casual or permanent?

As an employer, you must consider the status of **every casual employee** before you can decide whether the *Rossato* decision impacts your organisation. However, in legal disputes, it is pretty clear that you should assume that **the way in which the contract has been performed will not be ignored**. This is because events after the signing of any contract or engagement of any worker could demonstrate a **change or variation** to the terms of engagement.

Also, subsequent events are relevant because the assessment of the employment arrangement is not strictly about the contract, but rather about the wider aspects of what is going on in the employment relationship.

In other words, the **label given to the status of the employment arrangement** is relevant but will not be a conclusive determining factor whether the worker is a casual or a permanent employee.

In the *Rossato* decision the Court considered a range of matters it considered important such as:

- The **regular pattern of work** including the fact that Rossato could not really reject or change his shifts
- **Pre-determined hours and patterns** (this is a FIFO case in the mining industry which works quite differently from other industries)
- The provision of **free on-site accommodation** which suggested that Rossato was expected to be at work
- Interactions between Workpac and Rossato which suggested an **intention of ongoing continuity of employment**

This decision does not really clarify how the law will be applied in other factual situations. As an employer, you will still be able to challenge both the *Skene and Rossato* decisions if you can distinguish the facts in each of their particular casual arrangements.

Offset arrangements: can they apply?

In the *Rossato* decision, **offset was denied**. This was because the Court said that this case was argued not as a offset but rather as the **employer wanting a credit for payments made for the leave loading**. For a number of reasons, the Court did not give the credit Workpac was seeking. But in basic terms, its reasoning appears to be that the casual loading was not paid as a offset against leave entitlements.

It may be possible to argue that the loading should take into account money claims lodged in the future. Whether the Court agrees remains to be seen and will depend on the facts of each case.

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Discussion

The decision runs for more than 272 pages and while the Judges were in some general agreement about the result, there were significant divergent opinions on important topics. What is clear is that **employers will continue to challenge claims made by casuals** if the facts are different to the *Skene and Rossato* decisions. However, an employer must be able to argue that the arrangements and features of the employee's employment **do not give rise to an advanced commitment and ongoing indefinite work**. If an employer is not able to do this, it will have some difficulties defending such claims. It will also be difficult to run restitution or offset defences. This may mean that if the employee's claim is successful, they get to keep the casual load receive the benefits of the NES or any enterprise agreement.

It is not yet known whether this decision will be appealed to the High Court. It is likely. You may recall that **Regulation 2.03A of the Fair Work Regulations** was introduced after the *Skene decision.* But given the Court's findings in *Rossato,* the regulation is **limited to claims 'in lieu' of an entitlement**. This could mean that it is only useful to employers for claims made by former employees, **not current employees**. I expect that the government will expedite further legislative changes to attempt to remedy this issue. At the moment, and without legislative reform, this *Rossato decision* may have retrospective application.

What to do now?

As an employer, you must **urgently review casual worker contracts of employment**. You must also review the way in which your organisation **engages, rosters and interacts** with them regarding availability for work.

In short you should:

- Review the contracts and the express terms
- Review rostering arrangements
- Make sure you separately identify casual loading in all payslips
- Consider in detail every casual employee arrangement to determine their patters of work

We will keep you informed. If you require us to undertake a review for you please get in touch.

[1] WorkPac Pty Ltd v Skene [2018] FCAFC 131 - See Bradbrook Lawyers website - https://www.bradbrooklawyers.com.au/news-views/

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Note: This NewsFlash is provided for information purposes and does not constitute legal advice. If you require legal advice regarding your particular circumstances, please contact me.

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